denial of an intention to waive. *Hatch* v. *Calhoun County,* 170 Mich. 322; *St. Louis Railway* v. *Mulkey,* 100 Ark. 71, Ann. Cas. 1913C 1338, and note. The trial court seems to have fallen into the same error which has deterred minority courts from following the general rule on the ground that its adoption would provide a trap for the unwary and a penalty of a denial of trial by jury upon a motion for directed verdict. *Wolf* v. *Chicago Sign Co.,* 233 Ill. 501, 13 Ann. Cas. 369, and note; *Virginia-Tennessee Hardware Co.* v. *Hodges,* 126 Tenn. 370. One court at least has reached the minority rule as a matter of logic and analysis of the effect of a motion for directed verdict, saying that "one who claims that the evidence is all his way cannot reasonably be held to waive the right to claim that, at least, some of it is his way." *Fitzsimmons* v. *Richardson,* 86 Vt. 229. That the minority courts have no reason to refuse to follow the majority rule because of its danger is not only shown conclusively by the decision of the court in the principal case but also by an unbroken line of decisions in courts following the majority rule. *Empire State Cattle Co.* v. *Atchison Ry.,* 210 U. S. 1, also note in 6 Ann. Cas. 547; *Pemiston* v. *Coleman,* 126 N. Y. S. 736. The power of counsel to request a jury trial even after both parties have moved for directed verdicts apparently should conclusively answer the objections to the general rule given voice to in the *Wolf* and *Hodges* cases, *supra.*

VENDOR AND PURCHASER—AGREEMENT TO CONVEY FREE FROM ENCUMBRANCES AS APPLIED TO VISIBLE EASEMENTS.—Suit was brought by an executor to enforce specifically an agreement for the sale of land free from all encumbrances. W defended on the ground that the plaintiff could not give him a marketable title, since the land was subject to an easement of way for electric wires carried upon huge steel towers. *Held,* no defense, for vendee is presumed to have contracted to accept the land subject to encumbrances of an open and notorious nature. *McCarty* v. *Wilson* (Cal., 1920), 193 Pac. 578.

The decision of the principal case rested largely upon another recent California decision, *Ferguson* v. *Edgar* (1919), 178 Cal. 17, where it was held that a vendee had no right to rescind a contract to purchase land free from encumbrances, because of the existence of an irrigation ditch and canal upon the land. This principal has been generally applied in cases involving a public highway, *Patterson* v. *Arthurs,* 9 Watts (Pa.) 152, and especially in suits upon covenants against encumbrances by the grantee of a warranty deed. MAUPIN ON MARKETABLE TITLE, 304; *Kellog* v. *Ingersoll,* 2 Mass. 97, *contra;* and in one case at least it was held not an encumbrance within the meaning of the covenant, even though the purchaser did not know of the existence of the highway. *Sandum* v. *Johnson,* 122 Minn. 368, but this case is extreme. As to ordinary private easements, the authorities are irreconcilably in conflict. The theory of one group of these cases seems to be that the instrument being the grantor's, and having failed to put in an exception, he must abide by his covenant as made, and knowledge by the grantee cannot have the effect of qualifying a general covenant, since an article may be warranted

to be sound when both parties know it to be unsound (*Hubbard* v. *Norton*, 10 Conn. 423; *Beach* v. *Miller*, 51 Ill. 206); but the general rule is that a general warranty does not cover defects which the buyer must have observed. WILLISTON ON SALES, 207. In *Haldane* v. *Sweet*, 55 Mich. 196, Cooley, J., laid down the rule that the existence of an alley which is visible is no excuse for failing to perform a contract to purchase land, in accordance with the reasoning of the principal case. *Kutz* v. *McCune*, 22 Wis. 628; *Smith* v. *Hughes*, 50 Wis. 620, accord. It is submitted that although the rule of the principal case seems to be more calculated to do justice where urged as a merely technical defense to a contract lawfully entered into, the opposite rule is more logical, and not so dangerous to apply. See 30 L. R. A. N. S. 833 and 48 L. R. A. N. S. for a compilation of the authorities.

WILLS—TRUST NOT CREATED BY DIRECTION TO DISPOSE OF PROPERTY "ACCORDING TO BEST JUDGMENT."—A will directed the executor and another named person "to divide and distribute the residue according to their best judgment." In a bill for a construction of the will, *held*, there was no trust, express or implied, but an unqualified power of appointment which the court could not control. *Harvey* v. *Griggs* (Del., 1920), 111 Atl. 437.

There are two possibilities in such a case. *First*, the language may be interpreted as an absolute power of disposition, uncontrollable by the court. Second, it may be regarded as creating a trust which is void for indefiniteness, and there will be a resulting trust for the heirs or next of kin. In the following cases no trust was implied: "to be at the disposal of his wife in and by her last will and testament to whom she shall think fit and proper to give the same," *Robinson* v. *Dungate*, 2 Vern. 181; "to be disposed of unto such person or persons * * * as they in their discretion shall think proper and expedience," *Gibbs* v. *Rumsey*, 2 V. & B. 294; to executors to dispose of "as they in their discretion shall think fit," *Paice* v. *Archbishop of Canterbury*, 14 Ves. Jr. 364; to be disposed of "as the trustee hereof for the time being in the uncontrolled absolute discretion or pleasure of such trustee shall see fit," *Norman* v. *Prince*, 40. R. I. 402. In the following cases a resulting trust for the heirs or next of kin was imposed: "Upon trust to * * * dispose of the ultimate residue to such objects of benevolence and liberalty as the bishop * * * in his own discretion shall most approve of," *Morice* v. *Bishop of Durham*, 9 Ves. Jr. 656; "in trust to expend solely for benevolent purposes in their discretion," *Willets* v. *Willets*, 103 N. Y. 650; "in trust to be distributed and disposed of as he pleases," *Haskell* v. *Staples*, 116 Me. 103; "to such charitable, educational and scientific purposes as in your judgment will most substantially benefit mankind," *Tilden* v. *Green*, 103 N. Y. 29. For many other cases see AMES, CASES ON TRUSTS [2nd Ed.], p. 93, note; 37 L. R. A. (N. S.) 400. Having determined in the instant case that the executor took an arbitrary power of disposition, the case is simple of solution. If he is willing to carry out the obvious intention of the testator, the court cannot prevent him. *Norman* v. *Prince*, *supra*. But if it is clear that the executor is not to take beneficially (courts have seized upon the words